NO. 77-1070

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHARLES E. KOEHNEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Charles E. Koehnen, (hereafter, defendant) prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Order Below

The Order of the Court of Appeals, unpublished per Seventh Circuit Rule 35, is reprinted as Appendix A, *infra*.

Jurisdiction

The Order of the Court of Appeals was entered on November 28, 1977. Defendant's timely petition for rehearing and suggestion for rehearing in banc was denied on January 11, 1978 (App. B, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22(2) of the Rules of this Court.

QUESTIONS PRESENTED

1.

A. Where the federal jurisdictional nexus with an offense (18 U.S.C. ~~659~~ 956) being investigated by a grand jury exists, if at all, independent of anyone's conduct—here, whether or not a particular building abroad was foreign-government-owned, may the government hale a defendant before the grand jury, interrogate him, and then prosecute him for false statements, absent even a semblance of proof —either before the grand jury or at the subsequent trial— of said jurisdictional nexus?

B. More particularly, in the above circumstances, may defendant's false-statement convictions be upheld where, additionally:

(1) In response to defendant's Motion for a Bill of Particulars, with respect to ownership of the property, the government responded: "the government is *not at liberty to disclose*[1] the result" of its investigation; and

(2) After conviction but before sentence, evidence was admitted that the property was *not* owned by an entity rendering it subject to the statute?

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[1] R. 19. (Emphasis added.) "R." refers to the Record on Appeal, and "Tr." to the Transcript of Proceedings.

C. Does defendant's conviction under these conditions run afoul of the Constitution because this amounts to perversion of the purposes of the grand jury, thereby violating the guarantee of grand jury indictment as insulation against prosecutorial overzeal, and (at least indirectly) circumventing the protections of the Fourth, Fifth and Sixth Amendments as well?

2.

A. Was the record so devoid of evidentiary support for three elements of the offense, 18 U.S.C. 1623 (materiality, falseness, and oath) that defendant's convictions therefore violate due process?

B. May the prosecution's introduction of a scintilla of evidence as to an element of an offense shift the burden to defendant to disprove same, absent which the element is deemed established and he is convicted; or does this do violence to his constitutional guarantees of confrontation, presumption of innocence, and proof beyond a reasonable doubt?

3.

Did the court's instructions deprive defendant of due process of law, where:

(A) The jury was never instructed properly as to the elements of the offense; and

(B) With various inferences feasible, the court refused to instruct upon defendant's theory of the case?

And as the jury felt the need to make inquiry of the court (unanswered), does this not reflect that defendant was indeed prejudiced by the incomplete instructions?

4.

Here, where only a single, unfragmented grand jury investigation was in progress, will due process permit imposition of multiple, consecutive sentences for alleged false statements during the course of the said grand jury inquiry, albeit the government has managed to frame the indictment into two counts?

Constitutional Provisions and Statutes Involved

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the assistance of Counsel for his defence."

Title 18, U.S.C. Sec. 1623(a), for violation of which defendant stands convicted, reads as follows:

> *False declarations before grand jury or court*
>
> (a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18 U.S.C. Secs. ~~659~~ 956 and 1343, charged violations of which were alleged to be the subject of the grand jury investigation during the course of which defendant made the statements for which he stands convicted for violation of sec. 1623, are adequately summarized in the court's Order, see footnotes 1 and 2, p. App. 3, and accompanying text, and therefore are not herein repeated.

Statement of the Case

Charles E. Koehnen was indicted in two counts: (1) making false material declarations to a Grand Jury in the Northern District of Illinois in that he denied he knew a man by the name of Frank Pedote and that he did not tell an F.B.I. agent in Minnesota that Pedote asked him to buy some plastic drums, and (2) that before the same Grand Jury he testified he did not re-package plastic drums of paint thinner and send them out of the State of Minnesota, and that he did not give or sell the paint thinner to anybody. (R. 1)

It was alleged in the indictment that the Grand Jury was investigating possible violations of the criminal laws,

Secs. 956 and 1343 of Title 18, U.S. Code, and that it was a material matter for the Grand Jury to determine whether Koehnen had purchased the paint thinner and plastic drums at the request of Frank Pedote and whether he knew a person by the name of Frank Pedote.

The indictment further stated the defendant made the false material declarations while he was under oath as a witness before said June 1976 Grand Jury.

The matter under investigation was an arson alleged to have been committed on a warehouse in Copenhagen, Denmark. Sec. 956, T. 18, U.S. Code makes it a crime for an American citizen to do damage to foreign property owned by a foreign country or local government thereof.

Before trial, defendant moved for a Bill of Particulars requesting the specifics of the federal investigation being conducted and further requesting where the alleged offense (the alleged arson) took place and the specifics by which the inquiries to the defendant were material for the Grand Jury. (R. 10) The government answered the Bill in a letter as to the ownership of the place burned, as follows:

> "In regard to the ownership of Copenhagen Free Port Warehouse D, I would suggest you contact appropriate Danish officials or make other inquiries since the government is not at liberty to disclose the result of investigations in connection with ongoing Grand Jury investigation." (R. 19)

Receiving such advices, defendant filed for a continuance of the trial on February 8, 1977, (R. 19), on the ground that the defendant was investigating through correspondence the ownership of the facility and that it takes time for mails to go to and come from Denmark. A request for a 30-day continuance was denied by the court and the trial commenced on February 8, 1977.

After trial and conviction but before sentence, defendant moved on March 14, 1977 to supplement the record, which

motion was allowed. (R. 33) The record was supplemented with official documents from Denmark showing that the Warehouse D in question was owned by the Copenhagen Free Port Company, Ltd., Hovedvej 6, The Copenhagen Free Port DK-2100 Copenhagen. (R. 32) Attached to the motion were photocopies of the original certified and authenticated statement of ownership by the Copenhagen Free Port Company, Ltd. of Copenhagen, Denmark.

The court denied the motions for a new trial. (R. 34)

The evidence at trial did not disclose that defendant had taken the oath, nor was he sworn to tell the truth. (Tr. 11; 22)

During the course of the trial, there was testimony from witnesses that Koehnen had *said* he knew a Frank Pedote, but there was **no** evidence that he *actually* knew Pedote.

Evidence was also adduced that defendant had purchased six drums of paint thinner (he was in the car repair business); and there was evidence that he sent some paint thinner out of the State of Minnesota to Illinois. (Tr. 67-68)

The government never established that the warehouse facility in Copenhagen, Denmark was owned by the government of Copenhagen. To the contrary, evidence came into the possession of the defendant *after*[2] his conviction that the facility was owned by a non-government entity. (R. 32-33)

Defendant was sentenced to a term of four years on each of two counts to run consecutive for a total of eight years, and a $10,000.00 fine. (R. 34-35)

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[2] But the court denied defendant's reasonable request for a continuance to obtain documents from Denmark. (R. 19)

REASONS FOR GRANTING THE WRIT

Prefatory Statement

The caveat that a reviewing court not consider questions in a vacuum[3] must also apply to the decision whether or not to consider a cause on discretionary review *at all*. Invidious issues, out of context, may appear innocuous; but when the whole of them as framed by the entire record fairly screams of constitutional rights raped beyond recognition, then despite the melodious responses of the government which seem to assuage the Constitution's ruffled feathers, we pray that this Court of last resort will open its ears to hear the cacaphony and perceive what *really* happened here.

• • •

Throughout his ordeal, defendant has challenged the competency of the grand jury's inquiry, absent proper evidence that the property damaged abroad belonged to a foreign governmental entity—a necessary nexus to federal jurisdiction. Attacked, too, was the sheer hearsay nature of that evidence deemed to have established "materiality," a judicially-determined element of the false-statement offense.

Defendant's efforts to ascertain the particulars of the government's prosecutorial theory were thwarted by the government's "cover-up" tack in responding, as to ownership of the property, a crucial issue:

"*the government is* **not at liberty** *to respond . . .*"[4]

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[3] *Kotteakos* v. *United States*, 328 U.S. 750, 761-65 (1946).

[4] R. 19. (Emphases added.)

Neither the prosecutor nor the court, nor the "government," for that matter, has an inkling of what it means to be "not at liberty;" but defendant surely does. He stands to lose 8 years of his freedom as we shuffle papers in the cause.

Each of the questions presented to this Court must be considered in the light of the gestalt of the entire case. The Petition as a whole—not just the portions seemingly directed to the grand jury process *per se*—challenges some *basics* of grand jury false statement prosecutions. Never lose sight of the prosecutor's total control of the grand jury proceedings as evidenced herein. We urge that this Petition be considered as a unity, and that this Court cognotice the imminent, immense danger portended in the panel's peregrinations.

1.

Where the federal jurisdictional nexus with the offense being investigated (18 U.S.C. 659) by a grand jury exists, if at all, independent of anyone's conduct—here, whether or not a particular building abroad was foreign-government-owned—the government may not hale defendant before the grand jury, interrogate him, and then prosecute him for false statements, absent even a semblance of proof (either before the grand jury or at trial) of said jurisdictional nexus. Defendant's convictions for false statements may not be upheld where the government refused to disclose evidence as to ownership prior to trial, and after-discovered evidence established the property was not foreign-government-owned.

Defendant's convictions under these conditions run afoul of the Constitution for perversion of the purposes of the grand jury, thereby violating the guarantee of grand jury indictment as insulation against prosecutorial overzeal, and

circumventing the protections of the Fourth, Fifth and Sixth Amendments as well.

Certiorari should be allowed so this Court may nip this malodious practice in the bud.

• • •

> **The legitimacy of the grand jury's investigation must not hinge upon the collective belief of such entity, where such belief is fanned by the prosecutor's failure to ferret out facts which can prove or disprove the basis of the belief—sincere though it may have been—which alone can account for defendant's convictions.**

• • •

No matter can be "material" to a grand jury's investigation, "materiality" being an essential element of the offense,[5] unless the grand jury has jurisdiction over the matter under investigation.[6]

The court divines that as the *appearances* at the time defendant was before the grand jury, *not the true facts* as later they developed, *alone were pertinent*, the evidence consisting **solely** of the prosecutor's own testimony as to what he told the grand jury (though based on third-hand

[5] While materiality of the alleged false statements is an issue for the court, rather than the jury, to determine, it is an essential element of the offense which the government must prove or lose its case. *United States* v. *Koonce*, 485 F.2d 374, 380-81 (8 Cir. 1973); see guidelines as set forth in *United States* v. *Cohn*, 452 F.2d 881, 883 (2 Cir. 1971), and *United States* v. *Freeman*, 445 F.2d 1220, 1226-27 (2 Cir. 1971).

[6] If a grand jury lacks competency in the area of inquiry, the essential element of materiality is lacking, requiring reversal of a perjury conviction based upon testimony before such grand jury. *Brown* v. *United States*, 245 F.2d 549, 552-55 (8 Cir. 1957). *Accord*, *United States* v. *Jacobs*, 543 F.2d 18, 20 (7 Cir. 1976).

hearsay) was sufficient to establish this essential element.[7] Upon the facts and circumstances here, *this fiction must be squelched lest none be safe* from an overzealous prosecutor who declines to show his hand.[8]

There was no competent evidence to establish the essential element of materiality. The reviewing court deems Asst. U.S. Attorney Ward's testimony sufficient,[9] though, in fact, evidence admitted by leave of court after trial refuted ownership by a foreign government,[10] (the court earlier having denied defendant's motion for continuance to secure proof of ownership[11]). Recourse to this fictional (or, should we say, "imaginary"?) establishment of an essential element of the offense must be condemned, for multiple constitutional reasons.

The Sixth Amendment's confrontation clause forbids reliance upon (triple) hearsay evidence to establish an element of the crime. *Barber* v. *Page*, 390 U.S. 719 (1968); *Pointer* v. *Texas*, 380 U.S. 400 (1965).

The government's response in advance of trial—"the government is not at liberty to disclose" facts concerning ownership (R. 19)—must swing the scales in defendant's favor. It is no longer a simple issue as posited by the court; it is, rather, a complex abstrusity comprised of

[7] App. 4-5. The prosecutor, Ward, *said* that Agent Miller *said* a Swedish official *said* the warehouse was owned by the government of Copenhagen. (Tr. 231-33)

[8] In response to defendant's Motion for a Bill of Particulars, the government asserted it was "not at liberty" to disclose facts as to ownership of the property. R. 19; see p. 8, *supra*.

[9] App. 4-5. See Point 2, *infra*.

[10] R. 32-33; see App. 5.

[11] See R. 19.

lapses created by the government's very stance from the outset.

Constitutionally, as secured by the Fifth Amendment, the grand jury is

> ". . . a primary security to the innocent against the hasty, malicious and oppressive prosecution . . . serving the individual function in our society of standing between the accuser and the accused." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962).

While the platitudes of the reviewing court [12] may be true in the abstract, their application at bar—where ownership of the property was a readily-documentable fact, and the government declined to share its supposed knowledge either with the grand jury or the trial court—is unconscionable.[13]

• • •

[12] *I.e.*, that the only pertinent issue is the grand jury's belief based on AUSA Ward's testimony, itself first-hand, regardless of the actualities as later disclosed. App. 4-5.

> "It is enough if the grand jury was constituted for the purpose, and was in the process, of investigating **possible** federal criminal activity in the Northern District of Illinois." App. 4. (Emphasis added.)

[13] The jurisdictional fact here—ownership of the property—is not dependent upon any acts or omissions of any persons; status of the property alone is in issue. Could a federal grand jury inquire into a robbery of a purely local bank, for example, not covered by the bank larceny act, and then (per the prosecution) try persons for false statements before it? Of course not. Status of the bank in such a case is analogous to status of the property on foreign soil. And in each instance, the federal jurisdictional fact is clear, simple, and (presumably) easy to establish or to show that it cannot be proven. In such a case, failure properly to adduce competent evidence of such fact at *any* time, but to proceed with the grand jury investigation (and with steps resulting in defendant's conviction for false statements) nonetheless, must result in a finding that the grand jury was proceeding improperly in excess of its jurisdiction.

Something is rotten in Denmark

The government's sheer disregard for careful circumscription of federal jurisdiction as evidenced by its gross neglect (if not bad faith) in choosing to rely upon triple hearsay instead of checking out an easily discernible fact should deprive that same government of the satisfaction of exaction of its pound of flesh from *this* defendant.

In short, we do not complain of the grand jury's investigation itself; rather, what we *do* complain of is the **manner** in which the government *bamboozled* the grand jury into **believing** federal jurisdiction was present.

• • •

That defendant stands convicted of two counts, facing two consecutive 4-year sentences for alleged lies to a grand jury which believed it was investigating "damage to foreign property" of a building which later appeared not even to be properly subject to the applicable statute under circumstances where its initial belief came from unreliable hearsay, unchecked though verifiable, boggles the imagination.

Can a prosecutor carelessly inject into the collective consciousness of the grand jury, through rumor and report, any fact necessary to its jurisdiction even to investigate?

Defendants are convicted every day because juries are told that "No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate." LaBuy, Jury Instructions (Criminal), from Section 4.05, at 22 (1965). But here, defendant was convicted because a government representative off-handedly relayed admittedly third-hand hearsay to a grand jury which reasonably believed him—although a prosecutor should be required to *open* his eyes and investigate that which easily

can be investigated to end, once and for all, speculation whether a federal offense even is feasible.

A man should be convicted, if at all, for his own acts and intentions.

Defendant's conviction here utterly depends upon the grand jury's "state of mind" as induced by the gratuitous explanations of its guide and mentor, the prosecutor; and, as so graphically portrayed by the facts at bar, the grand jury is only as informed as the government (via the prosecutor) wants it to be.

And if the prosecutor decides that the grand jury's ignorance is the government's bliss, we have descended to that government of men, not of laws, from which our forebears thought to rise.

The panel mechanistically holds that since the grand jury sincerely believed the formula facts at the time of the inquiry, defendant must pay the price. A more pack-of-cards trial's been memorialized. This close second shows shades of the Cheshire cat, whose smile exists apart; yet without the cat there's no offense, and defendant does time for the grin.†

The grand jury did not act unreasonably; the government did. Accordingly, the grand jury was without proper jurisdiction. And the outcome is the same: *defendant ought not be punished for anything he said before a grand jury powerless for want of federal jurisdiction, either in fact or in semblance.*

> "[T]here comes a time when enough is more than enough—it's just too much." Judge John R. Brown in *Williamson* v. *United States*, 311 F.2d 441, 445 (5 Cir. 1963) (in another context).

† The court holds *"possible"* federal criminal activity is enough. App. 4. *"Possible,"* we submit, is an im*possible* standard to apply.

This Court should agree to hear the case and reverse in the exercise of its supervisory power, to put an end to the sweeping abuses without even appearance of propriety which all too often masquerade as grand jury investigations under the thumbs of overzealous prosecutors.[14]

> *That* the grand jury considered its questions important is not equivalent to *why* it so considered them; and as only the latter pertains to materiality, the panel's assumption that defendant could divine the former begs the question, for defendant remained in the dark and prejudiced by denial of his motion for a bill of particulars.

Again, defendant's fate is made to rest upon the state of mind of others; because the reviewing court prophetically assumes he can discern from the questions asked together with the face of the indictment *that* the grand jury considered them important, defendant is told he was not prejudiced by denial of his motion for a bill of particulars as to the government's theory of materiality.[15] Absent any information *why* the grand jury so considered them, *that* it did **cannot** sufficiently inform defendant.

The panel's reliance on the quoted language from *United States* v. *Gebhart*, 422 F.2d 281, 285 (9 Cir. 1970), further hinges defendant's assumed mental state (obviating the need for particulars) on *another's* state of mind—"that the *government* believes his answers were false."[16]

Considering the ease with which the government, through a grand jury, may investigate and then hold one respon-

[14] See, *e.g.*, *Hale* v. *Henkel*, 201 U.S. 43, 65 (1906); *Durbin* v. *United States*, 221 F.2d 520, 522 (D.C. Cir. 1954); *In re September, 1971 Grand Jury*, 454 F.2d 580, 585 (7 Cir. 1971).

[15] App. 7.

[16] App. 7, fn. 6. (Emphasis added.)

sible for perjury,[17] this Court must require the government to share more than *this* with defendant to dub his trial "fair."

• • •

Permitting this judgment to stand affirms governmental practices which should resoundingly be condemned. Aside from perversion of the function of the grand jury as perceived by this Court, and aside from the Sixth Amendment violation of reliance on hearsay, the tactics utilized here allow undermining, if not direct violation, of additional constitutional guarantees. By hauling a man into court and setting him up for false statement charges, as here, the government manages to operate without the strictures of the Fourth and Fifth Amendments as well; for not even a prima face case, let alone probable cause to believe, a federal violation may even exist, is required before the person of a defendant is seized for grand jury appearance. Nor does the Fifth Amendment's privilege against self-incrimination avail one such as defendant herein one whit, once he is in official clutches.

This Court must not permit the grand jury to be used as a prosecutorial tool for the violation of a man's basic rights.

Again, we urge that this question (as the others posited herein) be considered in context with all else that happened here.

Certiorari should therefore be allowed.

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[17] And considering, too, the singularly unenlightening response in *this* case by the government, "not at liberty to disclose" facts regarding the property's ownership. R. 19.

2.

The record was so devoid of evidentiary support for three elements of the offense, 18 U.S.C. 1623 (materiality, falseness, and oath) that defendant's convictions violate due process of law. The court's affirmance herein—whereby a scintilla of evidence by the government is deemed to shift to defendant the burden of disproving same—does violence to defendant's constitutional guarantees of confrontation, presumption of innocence, and proof beyond a reasonable doubt.

• • •

Materiality—an essential element of the offense of which defendant stands convicted—was established by third-hand hearsay.[18]

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[18] See pp. 11-12, fn. 7-13, *supra* and accompanying text, incorporated herein by reference.

Because the grand jury (*arguendo*) sincerely believed the triple hearsay rumor and report sufficiently (per the panel) to require a finding that its investigation was into an area of its competency, the panel miraculously also finds that same evidence sufficient to establish "materiality," an essential element of the offense. See App. 4-5.

While an ill-founded *albeit* good faith belief as to the property's ownership may, perhaps, permit the grand jury to inquire without risk of its members being found personally liable to citizens who assert their rights were violated by an inquiry, surely such good faith belief may not, in itself, confer the federal jurisdictional element and instill it into the proceedings.

At least, not where the belief was engendered by none other than the creative government.

Yet that is exactly what the court's analysis requires.

This, despite the due process "reasonable doubt" standard; this, despite the *caveat* of the Court that the Constitution cannot countenance a conviction including an element established only by hearsay. *Barber* v. *Page*, 390 U.S. 719 (1968): see *Pointer* v. *Texas*, 380 U.S. 400 (1965).

"Falseness" of the statements in question—also an element—was deemed established by proof that defendant earlier had *said* certain things, absent evidence aside from his own statements that he in fact had *done* or *known* what he had *said* he had done or known.[19]

And **that defendant was under oath**—also essential to conviction—was deemed proven solely by evidence that he had "agreed" to tell the truth, absent disclaimer of record of a conclusional reportorial preface that was not even properly published to the jury.[20]

• • •

The manner of "proof" as to each of these three essential elements is such that the convictions offend due process of law; for a conviction devoid of evidentiary support violates due process. *Thompson* v. *City of Louisville*, 362 U.S. 199, 204 (1960); *In Re Winship*, 397 U.S. 358, 364 (1970).

Additionally, the so-called "proof" of elements offends other constitutional provisions as well. While defendant's asserted "admissions" as to certain things may constitute some degree of proof of the truth of their contents as well

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[19] See pp. 6-7, *supra*; see App. 9-11.

[20] See App. 8-9, fn. 7 & 8, and accompanying text; see fn. 22, p. 19, *infra*.

The evidence adduced was insufficient, per such holdings as *Smith* v. *United States*, 363 F.2d 143 (5 Cir. 1966); and see *United States* v. *Edwards*, 443 F.2d 1286, 1290-91 (8 Cir. 1971). The instant decision conflicts with these cases.

The court reporter's recital that the witness was sworn is the reporter's conclusion, absent the oath itself; ergo it is *not* on the same level as the reporter's reportage of words actually said. (See App. 9, fn. 8.) As the contents were conclusional, that the jury heard same does not bridge the gap betwixt fact and the government's fancy.

as of the fact that he had made such statements, to hold, as does the reviewing court, that such "admissions" suffice as proof of the element of falsity violates defendant's basic right not to be convicted out of his own mouth, as well as his constitutional rights to the presumption of innocence and requirement of proof beyond a reasonable doubt. To the extent that the federal rules of evidence may appear to permit such holding,[21] this Court must quickly examine the manner in which they are thus being applied by the judiciary.

By the same token, holding that the evidence of "oath" was sufficient, absent contradiction by defendant at trial, violates those same precepts and must not be countenanced.[22] To face these issues, this Court should allow this Petition.

3.

The court's instructions deprived defendant of due process of law, where the jury was never properly instructed as to the elements of the offense, and, although various inferences were feasible, the court refused to instruct upon defendant's theory of the case. The jury's inquiry of the court reflects that defendant was indeed prejudiced by the incomplete instructions.

Defendant was deprived of a fair trial, for the jury was not given legally available options theoretically possible upon the evidence, consistent with defendant's innocence

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[21] F.R.Ev. 801(d)(2), applied by the court, App. 9-11.

[22] See fn. 20, p. 18, *supra*.

Moreover, here, *the court reporter's preface was not even before the jury*. While the grand jury minutes were admitted into evidence, (Tr. 22; G. Ex. 2), only selected portions, consisting of specific questions and answers, were submitted to the jury. (See Tr. 23-28)

The court reporter was not called as a witness.

and hence requiring acquittal.[23] That the jury was so confused as to inquire of the court [24] bolsters defendant's position that he was prejudiced†† by the improper instructions. They were looking for theories consistent with his innocence but were not instructed that any were legally relevant. *Holt* v. *Virginia,* 381 U.S. 131, 136 (1965); *United States* v. *Vole,* 435 F.2d 774, 778 (7 Cir. 1970).

• • •

Though the statute would seem to require a finding that the defendant was sworn to tell the truth by one duly authorized to administer oaths, the reviewing court has held this unnecessary on the basis of a non-authoritative decision.[25]

Instructions which, as here, effectively remove from the jury's consideration an essential element of the offense, invade the province of the jury and are constitutionally

[23] Instructions as to inferences which may or may not be drawn are proper, and refusal so to instruct can infringe upon various constitutional rights, including right to counsel. See *Herring* v. *New York,* 422 U.S. 853 (1975); *United States* v. *DeLoach,* 504 F.2d 185, 189-90 (D.C. Cir. 1974); *United States* v. *Phillips,* 217 F.2d 435 (7 Cir. 1955). Hence the court's purported distinction here, based upon the negative inference aspect of the desired instructions (App. 10) cannot save the convictions. *United States* v. *Forbes,* 515 F.2d 676, 682-84 (D.C. Cir. 1975).

[24] R. 30; Tr. 26-28; 305. See *United States* v. *Jackson,* 257 F.2d 41 (3 Cir. 1958). In fact, the totality of the grand jury minutes—only a portion of which was read to the jury (Tr. 26-28)—disclosed that defendant was not asked the question concerning which the jury inquired. See App. 12-13.

†† Jury inquiry has been held indicative that a given case was a close one for them to decide, tending to make *any* error prejudicial. *Osborne* v. *United States,* 351 F.2d 111, 118 (8 Cir. 1965).

[25] *United States* v. *Devitt,* 499 F.2d 135, 137 (7 Cir. 1974); see App. 8, fn. 7.

infirm as amounting to partial direction of a verdict of guilty.[26]

Per the precepts of *Bronston* v. *United States,* 409 U.S. 359 (1973), and *United States* v. *Lozano,* 511 F.2d 1 (7 Cir. 1975), the "falsity" element in perjury prosecutions is strictly construed. Thus, defendant's denials were not necessarily disproven by evidence of his prior alleged "admissions" alone.[27]

• • •

Considering the entirety of the cause, the errors as to the instructions herein complained of contributed to the impossibility that defendant could have received a fair trial in accordance with his constitutional rights. Certiorari should be allowed.

4.

The Consecutive Sentences are Illegal.

Assuming that our arguments have not fallen on deaf ears, at the very *least* defendant ought not suffer doubly.[28]

[26] *Screws* v. *United States,* 325 U.S. 91, 107 (1944); see, *e.g., Byrd* v. *United States,* 342 F.2d 939, 941 (D.C. Cir. 1965); *United States* v. *Skinner,* 437 F.2d 164 (5 Cir. 1971).

[27] See pp. 18-19, *supra.*

[28] While multiple sentences for perjury based upon answers given during the course of a single grand jury appearance may be proper where each count of the indictment reflects a separate and distinct facet of the grand jury's investigation, that does not properly apply here, where only a single, unified and unfragmented investigation was in progress. See *United States* v. *Lazaros,* 480 F.2d 174, 179 (6 Cir. 1973); *Gebhard* v. *United States,* 422 F.2d 281, 290 (9 Cir. 1970); *cf. United States* v. *Doulin,* 538 F.2d 466, 471 (2 Cir. 1976).

Moreover, the principles of such cases as *Baker* v. *Eisenstadt,* 456 F.2d 382 (1 Cir. 1972), and *Yates* v. *United States,* 355 U.S. 66, 73 (1957), from the analogous area of contempt for refusal to testify, militate against multiplying punishments here. In *Yates* this

(footnote continued)

That something *can* happen, does not mean it *should*.

Upon the facts as here, if the convictions must be affirmed, still the double-time sentences for essentially a single course of conduct amount to an abuse of discretion, subject to correction on appellate review, and to this Court's supervisory power.

PENULTIMATUM

The Seventh Circuit panel's fixed belief in defendant's guilt colored the decision throughout.

• • •

We submit the reviewing court's belief in defendant's guilt clouded its thinking from start to finish, but never so markedly as in its disposal of the sufficiency-of-the-evidence arguments in conjunction with defendant's contentions that the confused jury never was allowed to consider defendant's theories of possible innocence.[29]

Although uncomplicated "sufficiency of the evidence" arguments may require that the evidence be construed most favorably to the government,[30] this same bent should not

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(footnote continued)

Court stated: "[T]he prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused answers." *Ibid.*

The government ought not be permitted to exact two penalties through the technique of framing an essentially unified course of testimonial conduct as two separate counts. (end of footnote)

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[29] See App. 8-13.

[30] App. 8.

dog the tracks of defendant's other arguments as well, intertwined with "sufficiency" though they may be.[31]

While "the evidence is to be assessed in the government's favor," this must *not* mean that a fixed belief by the reviewing court in the defendant's guilt—which belief shrieks through the lines of the Order at bar—may dispose of related issues as well.[32]

• • •

The lower court's blinders, secured on appeal, strait-jacketed the jury, jailing defendant.

Simple vision focused on reality is all that it takes to see where we'd be without checks and balances.

We trust *this* Court will not look at the cause through guilt-colored glasses.

CONCLUSION

For any or all of the reasons herein advanced—in particular, so that this Court may examine and condemn total prosecutorial control of grand jury functions to the tune of creation of a federal offense though none could have existed in fact—certiorari should be allowed, and defendant's convictions should be reversed, or reversed and remanded.

Respectfully submitted,

JULIUS LUCIUS ECHELES
CAROLYN JAFFE
Attorneys for Petitioner

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[31] Even if the evidence be deemed "legally sufficient," still defendant may have been denied a fair trial if the jury was not properly instructed on options leading to acquittal. See pp. 19-21, *supra*.

[32] *Bollenbach* v. *United States*, 326 U.S. 607, 614-15 (1946).

APPENDIX

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
(ARGUED SEPTEMBER 26, 1977)
November 28, 1977

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

Before

Hon. LATHAM CASTLE, Senior Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 77-1362 vs.

CHARLES E. KOEHNEN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 76 CR 1139

Bernard M. Decker, Judge.

O R D E R

Defendant Charles E. Koehnen was convicted in a jury trial on two counts of perjury before a grand jury, in violation of 18 U.S.C. § 1623. He was sentenced to imprisonment for four years and a fine of $10,000 on each count, the sentences to run consecutively. We affirm the judgment.

I. The Proof of Materiality and the Bill of Particulars Addressed Thereto

Defendant presents two somewhat related arguments regarding the materiality of his testimony before the grand jury. He first argues that no competent evidence was adduced at trial to establish the materiality of the statements. Alternatively, he argues that the trial court's denial of his motion for a bill of particulars, which requested elaboration on how the statements were material, unduly prejudiced the preparation of his defense to the charge.

Materiality is, of course, an element of the crime of perjury, as the statute itself makes clear:

> Whoever under oath ... in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration ... shall be fined not more than $ 10,000 or imprisoned not more than five years, or both

18 U.S.C. § 1623(a) (emphasis supplied). It is a rather unique element of the crime, however, inasmuch as regardless of whether the case is tried to a jury, this issue is one of law and therefore to be decided by the court. United States v. Parr, 516 F.2d 458, 470 (5th Cir. 1975); United States v. Koonce, 485 F.2d 374, 380 (8th Cir. 1973); United States v. Devitt, 499 F.2d 135, 138 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975). Seventh Circuit cases teach that a false statement is material if the testimony sought to be elicited from the witness may be in any way

helpful, at the time the testimony is given, to a legitimate investigation by the grand jury. United States v. Jacobs, 543 F.2d 18, 20-21 (7th Cir. 1976); United States v. Devitt, supra, 499 F.2d at 138-139; United States v. Wesson, 478 F.2d 1180, 1181 (7th Cir. 1973).

Defendant argues that no competent evidence was adduced to establish that the grand jury, when it subpoenaed and interrogated the defendant, was pursuing a legitimate function, i.e., investigating activities which might give rise to a federal criminal prosecution, and a prosecution for which venue could lie in the Northern District of Illinois. This is belied by the record, however. Assistant United States Attorney (AUSA) Ward, who conducted the grand jury investigation on behalf of the government [Tr. 229] testified at trial that the grand jury was investigating a possible conspiracy by American citizens to burn and destroy a building which it thought might be owned by the municipal government of Copenhagen, Denmark.[1/] [Tr. 231-233.] He also testified that the grand jury was investigating a possibly related wire fraud.[2/] [Tr. 231.] He further testified

1/ The grand jury was therefore investigating a possible criminal violation under 18 U.S.C. § 956, which proscribes conspiring by United States citizens to destroy property of a foreign government, or a political subdivision thereof, with whom the United States is at peace.

2/ See 18 U.S.C. § 1343.

that one of the suspected conspirators was a resident of Kenilworth, Illinois, and that acts in furtherance of the suspected conspiracy and fraud might have occurred there. [Tr. 230, 231-233.] This uncontroverted testimony sufficiently proved that when the defendant was subpoenaed to testify before the grand jury, it was investigating possible violations of federal criminal laws with a nexus to the Northern District of Illinois.

Defendant attacks this evidence as incompetent, "rank, third-hand hearsay." [Def. Br. at 6.] The source of the grand jury's information about the suspected crimes it was investigating is irrelevant, however. It is enough if the grand jury was constituted for the purpose, and was in the process, of investigating possible federal criminal activity in the Northern District of Illinois.[3/] As to this, AUSA Ward was testifying from first-hand knowledge. Furthermore, AUSA Ward's "third-hand" testimony as to what he was told by others and relayed to the grand

3/ Thus, defendant's cases are not relevant to the issue here. In Brown v. United States, 245 F.2d 549, 552-554 (8th Cir. 1957), the Eighth Circuit reversed a perjury conviction because the evidence of materiality adduced there unequivocally showed that the Nebraska grand jury was empaneled for the sole purpose of investigating activity which had transpired exclusively in Missouri. Accord, United States v. Koonce, 485 F.2d 374, 381 (8th Cir. 1973). But see United States v. Phillips, 540 F.2d 319, 328 (8th Cir.), cert. denied, 97 S.Ct. 530 (1976) (upholding a perjury conviction where the evidence was that the suspected conspirators resided in Missouri, although the substantive wrong for which the conspiracy was formed took place exclusively in Oklahoma).

jury was not hearsay in any event, because for purposes of the perjury trial, it was not offered to prove the truth of the matter asserted. Whether the building was in fact owned by the Copenhagen government was irrelevant at that juncture. Rather, the testimony was offered to show that the grand jury had information which led the grand jury to believe it should investigate, and what that evidence was. We therefore have no difficulty in saying that AUSA Ward's testimony was sufficient and competent evidence to support the trial court finding of materiality.[4/]

We also fail to see how the defendant was prejudiced by the denial of his motion for a bill of particulars, which requested elaboration on how the statements were

4/ Defendant's reference to his post-trial supplementary evidentiary motion which he claims demonstrated that the building was not owned by the Copenhagen municipal government [R. 32 and 33] demonstrates defendant's misconception on the issue of materiality. Whether at some time subsequent to defendant's grand jury testimony evidence appeared which disproved that the building was owned by a foreign government would of course be relevant to the grand jury's decision to indict, or a factfinder's decision to convict, under 18 U.S.C. § 956. But the evidence adduced at trial showed that at the time Koehnen testified before the grand jury, it suspected to the contrary, and defendant's post-trial offer of proof did not refute this in any way.

material.[5/] The purpose of a bill of particulars pertinent here is "to give the defendant enough information about the charge so that he may adequately prepare his defense and so that surprise will be avoided." 1 Wright, Federal Practice and Procedure (Criminal) § 129, at 287. The denial of the motion did not result in inability to prepare the defense or surprise.

The indictment informed the defendant that the grand jury was investigating a possible violation of the conspiracy-to-destroy-foreign-property statute, and the defendant was further informed in the government's response to defendant's motion for a bill of particulars that the property involved was in Copenhagen, Denmark, and the suspected object of the conspiracy arson. [R. 13 at 2.] Moreover, inasmuch as the defendant was interrogated by AUSA Ward before the grand jury, he must have known from the outset AUSA Ward's name and principal role in the investigation

5/ Inasmuch as this motion is addressed to the discretion of the trial court, that court's decision will be reversed only for an abuse of discretion. United States v. Jeffers, 532 F.2d 1101, 1113-1114 (7th Cir. 1976), affirmed in part and vacated in part on other grounds, 97 S.Ct. 2207 (1977); United States v. Johnson, 504 F.2d 622, 627 (7th Cir. 1974). Professor Wright suggests this is equivalent to determining whether the defendant was prejudiced by the denial. 1 Wright, Federal Practice and Procedure (Criminal) § 130, at 295.

and the focus of the grand jury investigation.[6/] Thus, even without the material requested in the bill of particulars, defendant knew that the grand jury was investigating a conspiracy to burn a Copenhagen building, a possible violation of 18 U.S.C. § 956, and he knew the identity of the sole witness who testified to this effect at the perjury trial. He knew from the face of the indictment that in connection with the above, the grand jury considered it important and material to ascertain who Frank Pedote was, and what the defendant had done with a certain quantity of paint thinner. The defendant was not prejudiced by the denial of the motion for a bill of particulars.

6/ The Ninth Circuit has said:

> In a perjury trial, assuming that, as in this case, the indictment lists the questions asked and the answers given, there is little else needed to enable the accused to prepare his defense. He knows that the questions have been asked, and he is told that the government believes his answers were false.

United States v. Gebhard, 422 F.2d 281, 285 (9th Cir. 1970).

II. Sufficiency of the Evidence on Counts I and II

Defendant next attacks the sufficiency of the evidence, which we must view in the light most favorable to the government. Glasser v. United States, 315 U.S 60, 80 (1942).

A. Whether Defendant Was Under Oath

An essential element of perjury under 18 U.S.C. § 1623 is that the defendant be under oath when he gives the allegedly false testimony.[7/] Defendant argues that the only evidence before the jury on this issue was AUSA Ward's testimony that defendant had "agreed" to tell the truth [Tr. 21], and agreeing to tell the truth is not the

7/ This element of the crime is not, contrary to the defendant's contention (Def. Br. at 15-18), that the oath, in addition, be duly administered by a person authorized to administer oaths. We agree with the government that United States v. Devitt, 499 F.2d 135, 137 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975), settles this argument adversely to the defendant. Defendant attempts to distinguish Devitt on the ground that the defendant there did not preserve the point by a proper objection to the jury instructions. Although the court in Devitt did note that defendant had failed to object, it nevertheless reached the issue on the merits. Moreover, this issue went to an asserted failure to instruct the jury on a necessary element of the crime and would have been subject to the plain error doctrine of Rule 52(b), Fed. R. Crim. P. We therefore reject defendant's argument with respect to the jury instruction dealing with the oath element.

equivalent of swearing to tell the truth. Whatever may be said of the sufficiency of Ward's testimony by itself, it does not stand alone. The transcript of defendant's grand jury testimony was admitted into evidence without objection by the defendant. [Tr. 22-23.] During closing argument the prosecutor informed the jury of the prefatory statement in the transcript, viz., that defendant had been "first duly sworn by the foreman to testify to the truth ...." [Tr. 256.] This was proper, inasmuch as once the document was received in evidence without objection, either party was entitled to inform the jury of its contents at any time.[8/] Defendant's contention must therefore be rejected.

B. Evidence of Falsity as to Count I

Defendant next argues that the evidence was insufficient to prove that Charles Koehnen in fact knew Frank Pedote. FBI Agent Burrill testified without contradiction, however, that Koehnen had previously told FBI Agent Burrill that he knew Frank Pedote. [Tr. 67-68.] This evidence of an admission by Koehnen was competent evidence of the truth of the matter asserted, viz., that Koehnen knew Frank Pedote, and was sufficient to prove the allegation of falsity as to Count I.

8/ Defense counsel's hearsay objection, raised when the prosecutor read this portion of the transcript to the jury, was obviously not timely, Fed. R. Evid. 103(a)(1). We therefore need not address ourselves to the propriety of the trial judge's overruling it; we observe, however, that the court reporter's recital that the witness was sworn is no more or less hearsay than his report of what the witness stated in his testimony.

Defendant's argument that this admission established that Koehnen said he knew Frank Pedote and nothing more discloses a misconception of the applicable rules of evidence. An admission of a party, such as Koehnen's statement that he knew Pedote, is proof not merely that the statement was made but of the truth of the matter stated. Fed. R. Evid. 801(d)(2); 4 J. Wigmore, Evidence § 1048 (Chadbourn rev. 1972).

Equally meritless for a similar reason is defendant's argument that the trial court failed to instruct the jury on defendant's theory of the case, viz., that the government had to prove that the defendant knew Frank Pedote and not that defendant said he knew Frank Pedote. [Def. Br. at 20-22; R. 26C.] This instruction hardly represented a "theory of the case," but was an argumentative attempt to confuse the jury. The defense theory, in reality, and as exemplified by defense counsel's closing argument, was a plea to the jury to discredit the testimony of FBI Agent Burrill, who had testified to Koehnen's extrajudicial admissions, and to refuse to draw the inferences from this testimony. The jury was appropriately instructed on these "theories" [R. 27C, 27L, 27M] and, we note, without any objection by the defendant.

C. Evidence of Falsity as to Count II

What we have said in B, supra, applies equally to defendant's sufficiency argument on Count II, inasmuch as there was uncontroverted testimony of Koehnen's prior admission of having sent the paint thinner out-of-state. [Tr. 67-68.] Additionally, there was considerable testimony adduced to demonstrate circumstantially that Koehnen was responsible for sending the paint thinner to Chicago, Illinois, which we summarize in the margin.[9/]

9/ We have independently scrutinized the record with respect to the following summary taken from the government's brief [p. 4] and find it to be accurate:

> The evidence shows that on July 22, 1975, Auto Refinishers Warehouse sold and delivered some six 55 gallon steel drums of lacquer thinner (ARW-1) to Chuck's Garage. [Tr. 91-94, 98, 104.] On the same day, Midwest Can Company sold and delivered eight 30 gallon plastic drums to Chuck's Garage. [Tr. 110-112.] The Midwest delivery man heard Koehnen say he was going to transfer the thinner from the steel drums to the plastic drums. [Tr. 114.]
>
> On July 24, 1975, Koehnen and Anthony Carlone rented a U-Haul truck for a one-way trip to Chicago, Illinois. [Tr. 145.] Koehnen and Carlone were later observed at a St. Paul store buying some metal banding. [Tr. 125-126.] The next day, the U-Haul truck was returned for repairs. Wooden crates were at that time observed inside the U-Haul truck. [Tr. 149, 158.] Koehnen and Carlone later returned to the St. Paul store, and mentioned that there were barrels inside the wooden crates. [Tr. 127-128, 161.] Upon returning to Chuck's Garage, Koehnen and Carlone were met by Edward Pedote. [Tr. 162-163.] Pedote then left with the U-Haul truck. [Tr. 164.]
>
> Pedote was later stopped by police officers while on Interstate 94, after he had travelled into Wisconsin. [Tr. 164, 184.] He showed a police officer his driver's license. [Tr. 184.] As to the cargo in the U-Haul, Pedote

III. The Jury's Question

Defendant's penultimate contention is meritless. During their deliberation, the jury asked the trial judge whether "Mr. Koehnen [was] ever asked what he did with [the plastic barrels]?" [R. 30.] The trial judge immediately informed counsel of the jury's question and the proposed reply, which was given over counsel's objection as follows:

> The jury can consider only the evidence admitted in this trial in making its decision whether the defendant knowingly gave false answers to the particular questions charged in this indictment.

[R. 30.]

Defendant argues that this was reversible error as to Count II, to which the question pertained. Although not directly responsible to the jury's question, we can find no prejudice, absent which there is no error, as recognized in the authority defendant cites. United States v. Jackson, 257 F.2d 41, 43 (3d Cir. 1958).

Inasmuch as the defendant did not testify at trial, the jury's inquiry of whether he "was ever asked" a particular question must obviously refer to questions

9/ (continued)

said that the consignor was Tony Carlone and that the consignee was Frank Pedote. [Tr. 222.] The police officer opened the crates and smelled an odor which he described as being similar to cleaning fluid. He later identified the odor as similar to ARW-1. [Tr. 179-180, 189.] Finally, the police officer identified a partially burned plastic drum as being the same type that he had seen in the wooden crates on board the U-Haul truck. [Tr. 189-190.]

asked of him before the grand jury. The only questions relevant to the perjury trial asked of Koehnen before the grand jury, however, are those which formed the basis of his perjury conviction. The grand jury question relevant to Count II, as set forth in the indictment, was whether the defendant caused certain paint thinner to be sent out-of-state, not whether he had plastic barrels in his garage. Whether he was asked the question which the jury inquired about, and if so, what his answer was, and if not, why not, is simply irrelevant to the jury's function in this case.10/

IV. The Consecutive Sentences

Defendant's final contention is that the trial judge improperly sentenced the defendant to two consecutive sentences of four years incarceration and two $10,000 fines. Granted the severity of the punishment, we cannot find its imposition an abuse of discretion. Defendant was found guilty of two separate counts, and the sentence for each count was within that prescribed by Congress. 18 U.S.C. § 1623(a).

Defendant asserts that the "one lie, one sentence" rule announced in United States v. Gebhard, 422 F.2d 281, 290 (9th Cir. 1970) requires us to vacate one of the sentences

10/ We agree with the government that the likely predicate to the jury's inquiry was defense counsel's closing argument [Tr. 279]; the argument, however, was correspondingly irrelevant to the issues in the case.

imposed here. We disagree. Gebhard, as well as the other cases upon which defendant relies, recognized that if the questions and false answers which form the bases for the multiple perjury counts involve different, material aspects of a single overall transaction, then separate, consecutive sentences are appropriate. United States v. Gebhard, supra,[11/] United States v. Lazaros, 480 F.2d 174, 179 (6th Cir. 1973), cert. denied, 415 U.S. 914 (1974).[12/] The questions and answers here are of this nature. Whether the defendant knew Frank Pedote, and whether he caused the paint thinner to be shipped out-of-state, were clearly two separate and independent grand jury inquiries. Demonstrating the falsity of the defendant's answers involved different proof. As the Second Circuit has stated:

> In situations such as this where the grand jury is focusing its attention upon a series of related acts occurring over a period of time, it is inevitable that its questions will overlap to a certain degree. But such overlapping alone is not enough to require that the allegedly false responses of the witness be consolidated into a single perjury count where, as here, each of the critical inquiries was directed to a separate facet of the overall transaction being investigated.

United States v. Doulin, 538 F.2d 466, 471 (2d Cir.), cert. denied, 97 S.Ct. 256 (1976). Each of the answers, had they been truthful, might independently of the other have aided the grand jury in its investigation. The consecutive sentences were not improper and must be sustained.

The judgment is affirmed.

AFFIRMED.

11/ In Gebhard, the defendant was convicted on 15 counts of a 32-count indictment, and was given consecutive sentences totalling 17 years. Five of these counts were vacated on appeal.

12/ In Lazaros, the defendant was convicted on 12 counts and was given sentences of a year and a day on each count, the sentences to be served consecutively. The Sixth Circuit vacated three of these counts on appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 11, 1978.

Before

Hon. Latham Castle, Senior Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Philip W. Tone, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 77-1362 vs.

CHARLES E. KOEHNEN,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 76 CR 1139
Bernard M. Decker, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It Is Ordered that the aforesaid petition for rehearing be, and the same is hereby, Denied.